92-1182

Supreme Court, U.S.
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No. 92 - _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

PAULINE M. EWALD,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF WASTE MANAGEMENT;
CYNTHIA V. BAILEY; K.C. DAS;
WINSTON B. EVANS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Date: November 23, 1992

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err by departing from the mandate of Fed.R.Civ.P. 56 that genuine issues of fact be left for the jury to decide, when it affirmed the District Court's grant of summary judgment against Petitioner Pauline Ewald, former Director of the Commonwealth of Virginia's Superfund hazardous waste site investigation program, on her First Amendment and Due process claims, where material facts were clearly in dispute regarding the cause of Ms. Ewald's termination by the Commonwealth and the pre-termination process afforded Ms. Ewald, as evidenced by findings plainly stated in both the District Court and Fourth Circuit opinions, including findings that the reasons alleged by the Commonwealth in its required pre-

termination Notices to Ms. Ewald were not the actual reasons for her termination?

2. Did the Fourth Circuit Court of Appeals err by departing from the mandates of Fed.R.Civ.P. 5 and 77(d) and the guarantees of procedural due process of the Fifth and Fourteenth Amendments of the Constitution, when it affirmed the District Court's denial of Ms. Ewald's Motion for Relief from the District Court's pre-trial order limiting the time for and scope of discovery, where the District Court's failure to notify pro se plaintiff Ewald of entry of the pre-trial order severely prejudiced her effort to defend against the Commonwealth's Summary Judgment Motion?

3. Did the Fourth Circuit fundamentally misapply this Court's standard for pre-termination procedural due process established in Cleveland Board of Education v. Loudermill where the Fourth Circuit affirmed summary judgment against Ms. Ewald on her due process claim while finding that the Department's reasons for terminating her employment were reasons different than any stated in the required official disciplinary notices issued to Ms. Ewald?

PARTIES TO THE PROCEEDING

1. Petitioner:

Pauline M. Ewald.

2. Respondents:

Commonwealth of Virginia,
Department of Waste Management,
Cynthia V. Bailey,
K.C. Das, and
Winston B. Evans.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

No. 92-_____

Pauline M. Ewald,
Petitioner,

v.

Commonwealth of Virginia, Department of Waste Management; Cynthia V. Bailey; K.C. Das; and Winston B. Evans,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Pauline M. Ewald petitions this Court for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in this matter entered on July 22, 1992 and August 25, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the summary judgment decision by the United States District Court for the Eastern District of Virginia, Richmond Division, (Case No. CA-90-494-R) is unreported, reported as a Table case at 972 F.2d 339, with full text of slip opinion 91-1583 (4th Cir. 1992) reported at 1992 U.S. App. LEXIS 16863. The decision of the Court of Appeals is printed in the Appendix hereto, infra, page 2(a). The decision of the Court of Appeals denying rehearing is printed in the Appendix hereto, infra, page 1(a). The opinion of the District Court is reported at 1991 U.S. Dist. LEXIS 15828 (E.D.Va.). The decision of the District Court is printed in the Appendix hereto, infra, page 29(a).

JURISDICTION

The judgment of the Court of Appeals (Appendix, infra, page 2(a)) was entered on July 22, 1992. A timely petition for rehearing with suggestion for rehearing in banc was denied on August 25, 1992 (Appendix, infra, page 1(a)). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

- THE UNITED STATES CONSTITUTION -

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law ... .

AMENDMENT XIV

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- Federal Rules of Civil Procedure -

Rule 5. Service and Filing of Pleadings and Other Papers

(b) **Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof;

or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Rule 56 Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in party's favor upon all or any part thereof.

(c) Motion and Proceeding Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 77. District Courts and Clerks

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellant Pauline Ewald began her public service in environmental protection as an employee of the Commonwealth of Virginia's Department of Public Health in 1985. Joint Appendix (J.A.) at 47-48. When the responsibilities for environmental

protection were largely transferred to a new agency, the Department of Waste Management (DWM), Ms. Ewald went along. J.A. at 145. Prior to beginning her employment with the Commonwealth of Virginia (Virginia) Ms. Ewald received a Bachelor's degree in Biochemistry from Cornell University and later received a Juris Doctor specializing in government regulation from Syracuse University. J.A. at 47.

At the DWM, Ms. Ewald was assigned the responsibility to develop and supervise the beginnings of Virginia's federally funded Superfund hazardous waste program. As the position evolved, Ms. Ewald was referred to as the Superfund Pre-remedial Program Manager. J.A. at 145. In this role Ms. Ewald took on the responsibilities of preparing the programmatic portions of

grant applications submitted to the U.S. Environmental Protection Agency (EPA) and supervising the work to be done on waste sites that were hazardous or otherwise deemed a possible endangerment to public health or the environment.

Her supervisory role covered activities such as 1) preliminary assessments, 2) site investigations, 3) environmental testing, 4) communicating with concerned members of the public and the press, and 5) ranking hazardous waste sites for the purpose of determining if they should be placed on the Superfund National Priorities List (NPL). J.A. at 144-145. Ms. Ewald served the DWM loyally and with distinction. She received only satisfactory or above satisfactory performance evaluations until the day she was terminated on August 29, 1988.

J.A. at 5, 145-146.

Ms. Ewald was well respected by her staff who looked to her for leadership and guidance on the important work they performed for Virginia and the EPA. Id. Despite earning nothing but satisfactory performance evaluations throughout her tenure as a public servant, Ms. Ewald received six disciplinary notices (written notices) for alleged poor performance during a ten month period beginning in November 1987 and continuing through her termination in August 1988. J.A. 147-149. These notices, which were generated by her immediate supervisor K.C. Das, began only after Ms. Ewald raised concerns to her management and EPA about: 1) mischarging/misappropriation of EPA grant monies, 2) gross mismanagement of the DWM's Superfund program by her

immediate supervisor, 3) failure to properly enforce environmental laws and regulations at several hazardous waste sites throughout Virginia, and 4) lack of concern or prompt action on waste sites that negatively impacted public health or the environment. J.A. at 2-7, 125. A number of these written notices and other forms of harassment followed closely on the heels of Ms. Ewald's reports to EPA or her management. Id.

During her ten month personnel ordeal, Ms. Ewald contested the actions taken against her by Mr. Das both formally and informally. J.A. at 146-149. In either instance her efforts to understand the evidence and bases for the charges being lodged against her were met with vague resistance and a clear reluctance to provide specific information. J.A. at 129-132, 147-148.

Ms. Ewald attempted to rectify or conciliate the alleged deficiencies raised in the written notices but was unable to have any substantive discussions with Mr. Das or the DWM's Executive Director Cynthia Bailey, Mr. Das' immediate supervisor, about the escalating problem. J.A. at 146-149.

On August 29, 1988, Mr. Das requested that Ms. Ewald meet with him at 2:00 p.m. He did not specify the reason for the meeting. Ms. Ewald arrived for the meeting and was presented with her final written notice which contained a list of new offenses and specified that she was to be immediately terminated. These offenses were untrue on their face. J.A. at 149.

Mr. Das did not engage in any meaningful discussion with Ms. Ewald concerning her termination notice. He

did not discuss the charges stated in the notice. He did not even hint at the evidence he had to support his allegations. Mr. Das did not provide Ms. Ewald with any opportunity to respond to the allegations. Id. Because of Mr. Das' cryptic behavior, Ms. Ewald sought a meeting with the head of the agency, her second line supervisor, Cynthia Bailey. Ms. Bailey, through her secretary refused to meet with Ms. Ewald. Das specified that Ms. Ewald was to be out of her office by 5:00 p.m. or she would be arrested by the Capitol Police. Id.

Given the high level of hostility generated against Ms. Ewald by Mr. Das, presumably with Ms. Bailey's approval, Ms. Ewald thought it fruitless to challenge her termination through the full state grievance procedure. The

panel hearing portion of the grievance procedure appeared ineffective because it did not require persons to testify under oath, did not provide for reasonable discovery of documents and other information, and did not appear to require the agency to abide by the panel's decision. Id.

Consequently, Ms. Ewald first sought a remedy through a process provided for in Superfund and other environmental statutes which is administered by the U.S. Department of Labor (DOL). J.A. at 80-82, 150. Then with no resolution of her DOL complaint in sight, Ms. Ewald filed a pro se complaint in the U.S. District Court for the Eastern District of Virginia, Richmond Division, on August 29, 1990. J.A. at 1-17.

The District Court's first action

in the case was a November 29, 1990 pre-trial conference which established a date for trial and dealt with at least one speaking motion by counsel for Virginia. A five page "Jury Pretrial Order" was entered by the district judge on the same day. As is discussed below, this order setting detailed time limits and procedural requirements was not provided to Ms. Ewald until March 1991. J.A. at 25-29, 210. As a result the Commonwealth was able to refuse to respond to Ms. Ewald's discovery requests. J.A. at 161-171. The docketing sheet from the district court file notes the entry and filing of a pre-trial order (PTO) on November 29, 1990. Conspicuously absent from this entry is any reference to the PTO having been mailed or otherwise served on Plaintiff. All other docket entries

where mailing or some other form of service was accomplished appear to be noted on the docketing sheets. This evidence supports Ms. Ewald's claim that she was not timely served with a copy of the PTO.

Ms. Ewald brought the unfairness of the situation immediately to the attention of the District Judge in three filings. First, in her response to the Commonwealth's motion for dismissal and sanctions filed March 25, 1991. J.A. at 118-120. Second, in her response to the Commonwealth's motion for summary judgment filed on April 8, 1991. J.A. at 139-141. Third, in a special "Emergency Motion for Relief from Pre-Trial Order" filed on April 9, 1991 Ms. Ewald very specifically detailed the improper burden that had been placed on her because she was not timely advised

of the court's pre-trial order.

The District Court responded to Ms. Ewald's plea for fairness by stating in a footnote to the memorandum decision on summary judgment that "the [emergency] motion and brief demonstrate Ewald's awareness of the very rules and time limits she complains of." District Court opinion at 14, J.A. at 201. Ms. Ewald of course was complaining not of the Rules of Civil procedure but of the lack of timely notice of the pre-trial order. The court failed to address the substantive issues raised in Ms. Ewald's emergency motion and failed to specifically rule on the motion.

On April 10, 1991, at a hearing on Virginia's motion for summary judgment, the District Judge virtually dismissed all Ms. Ewald's claims. He reserved judgment on the Due Process claim, but

stated "that it is likely that the due process issue will be dismissed as well." J.A. at 187.

On April 22, 1991 a memorandum and final order were issued by the District Judge dismissing all of Ms. Ewald's claims. J.A. at 188-209. Ms. Ewald timely appealed. The judgment of the Court of Appeals (Appendix, infra, page 2(a)) affirming the District Court decision was entered on July 22, 1992. A timely petition for rehearing with suggestion for rehearing in banc was denied on August 25, 1992 (Appendix, infra, page 1(a)).

Ms. Ewald, as noted above, filed a complaint with the U.S. Department of Labor in September 1988 pursuant to the whistleblower protection provision of the federal Superfund Act. See, 42 U.S.C. § 9610; 29 C.F.R. Part 24

(regarding federal employee protection provisions). The case is currently before the Secretary of Labor on the recommended decision of an administrative law judge recommending summary judgment against Ms. Ewald on the basis of, via the doctrine of collateral estoppel, the Fourth Circuit decision regarding the reasons for Ms. Ewald's termination. Ms. Ewald has been represented by the counsel representing her in this Petition throughout the Department's process.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit, in Deciding Genuine Issues of Material Fact and Granting Summary Judgment Against Ms. Ewald, an Environmental Whistleblower Exercising Her First Amendment Rights Concerning Violations of Environmental Laws and Threats to Public Health, has Usurped the Responsibility of the Jury, Abdicated its Duty Under the Federal Rules, and Departed from the Accepted Course of Judicial Proceedings and Established Precedent Such that this Court Should Exercise Its Supervisory Power

It is well settled that a motion for summary judgment should be granted only if there are no material facts in dispute. Sartor v. Arkansas Natural Gas, 321 U.S. 620 (1944); Associated Press v. U.S., 326 U.S. 1 (1945); American Fidelity & Casualty v. London & Edinburgh, 354 F.2d 214 (4th Cir. 1965). It is also clear that in summary judgment proceedings pleadings and supporting information must be read in

the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654 (1962); Greear v. Loving, 538 F.2d 578 (4th Cir. 1976). Even when the opposing papers are unartfully drawn, such as in the case of a pro se litigant, the court must interpret them in the most liberal context favorable to the opposing party. Greear, 538 F.2d at 580; Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978); cf. Haines v. Kerner, 404 U.S. 519 (1972).

There is abundant and blatant evidence of genuine disputes as to material facts in the record of this case, as is summarized immediately below. This evidence in and of itself establishes that the Fourth Circuit abdicated its duty under Rule 56. However, the best evidence of the need

for this Court's exercise of its supervisory power in this case comes from the face of the Fourth Circuit Opinion itself.

On pages three and four of the Opinion the Court of Appeals lists the formal disciplinary Notices issued against Ms. Ewald by her employer, the Commonwealth of Virginia and summarizes the subject matter of eacn. App. at 7a-8a. Also see District Court opinion at 11, App. at 45a-47a. On page 3 of its Opinion, the Court of Appeals properly notes that "DWM had a standing policy that an employee could only be terminated if that employee received four group I disciplinary notices, or one Group II disciplinary notice combined with three Group I disciplinary notices." App. at 7a. Also see District Court Opinion at 4, App. at

35a-36a. Then, on page 7 and 8 of its Opinion, the Court of Appeals explains the examples of poor performance or misconduct that the District Court relied on in finding that Ms. Ewald's protected speech was not the "but for" cause of her termination, and that form the basis for the Court of Appeals' affirmance of that decision. App. at 16a-18a. Also see District Court Opinion at 25-26, App. at 65a-66a. The only problem with this rationale by the Court of Appeals and the District Court, apart from the fact that all of these reasons were disputed in the record, is that the two sets of reasons for termination listed in both Courts' opinions -- one set presented prior to termination in the formal notices issued per the Commonwealth's personnel policy, and the other set presented post hoc by

the Commonwealth in litigation and adopted by the Court of Appeals and District Court -- are different.

This simple fact is of profound importance. Where First Amendment Free Speech employment discrimination and due process claims are involved, a court cannot conceivably be in compliance with the rules established by this Court in Sartor v. Arkansas Natural Gas; Associated Press v. U.S.; American Fidelity & Casualty v. London & Edinburgh; and U.S. v. Diebold, Inc. (which rules require that summary judgment not issue if material facts are genuinely in dispute after reading the pleadings and supporting information in the light most favorable to the non-moving party) if the court grants summary judgment for the employer while at the same time finding that the

employer's post hoc stated reasons for the termination are different than the employer's stated reasons at the time of termination.

With regard to the pre-termination due process claim, if the court finds that the employer has stated a different set of reasons after the termination than were stated to the employee prior to termination, a genuine issue is created regarding whether or not the employee was ever told the real reasons she was being terminated as required under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), so that she might obtain an explanation of the evidence supporting the [real] charges against her and have an opportunity to present her side of the story as to why she should not be terminated based on those [real] charges. If the court

finds, as the Fourth Circuit and the District Court have in Ms. Ewald's case, that not only were different reasons stated post hoc but the post hoc reasons, rather than the reasons stated in the formal pre-termination notices, were actually the real reasons for the employee's termination, then not only is there a genuine issue preventing summary decision for the employer, but there is adequate basis for summary judgment for the employee. The employee, as a matter of law, would not have had the pre-termination opportunity for some kind of hearing to tell her side of the story and meet the charges and evidence against her when the real charges and evidence was never disclosed and a set of false charges were presented instead. Under these circumstances, the circumstances of this case, the

Constitution and Loudermill not only require that the employee at least be given her day in court before a jury on the genuine issues in dispute, but actually support summary judgment for the employee.

With regards to the First Amendment claim, again if the court finds that the employer has stated a different set of reasons after the termination than were stated to the employee prior to termination, a genuine issue is created regarding whether pretext exists, that is whether retaliation for protected speech was the real reason for the termination and whether the original reasons stated by the employer prior to termination were just a ruse to hide the discriminatory intent.

Both the District Court and the Court of Appeals decisions find on their

face that the reasons for the Commonwealth's termination of Ms. Ewald were specific reasons none of which are among the reasons both courts acknowledge as having been stated in the formal pre-termination notices. See Fourth Circuit Opinion at 3-4 and 7-8, App. at 7a-9a and 15a-18a; District Court Opinion at 11 and 25-26, App. at 65a-66a. All of the reasons relied on by both courts are shown in the record to have been post hoc rationalizations presented to the courts during the litigation.

Apart from the findings in the opinions of the courts below that the reasons stated by the Commonwealth for Ms. Ewald's termination after her termination were different than the reasons they presented her before her termination, in viewing the record in

Ms. Ewald's case there is no doubt that there are material facts in dispute. When cast in a light most favorable to her, Ms. Ewald's pleadings and opposition papers clearly establish the necessary disputed facts.

The District Court's most significant error concerns the "undisputed" facts that demonstrate that Ms. Ewald's speech was not the but for cause of her discharge. District Court opinion at 18, J.A. at 205, App. at 65a-66a. Although the District Court's reasoning is unclear, and the Court failed to make adequate findings of fact and conclusions of law, it appears, giving the Court the full benefit of the doubt, that the Court found not only the following facts, but held that these facts establish, as a matter of law, that Ms. Ewald was terminated for

legitimate reasons. These apparent "findings" are:

•Ms. Ewald's "supervisors had problems with her as early as the fall of 1986." (Ms. Ewald directly refuted this issue in her affidavit. Ewald affidavit ¶'s 15-16, J.A. at 144-51. Interestingly, Ms. Ewald's performance appraisals do not reflect that there were any "problems" as early as 1986. The mention of such problems, even if they existed, are clearly post hoc rationalizations by DWM management.)

•"There is no dispute that Ewald resisted and resented the actions of her new supervisor, Das, from the moment he got the job. Many of her complaints were about personal employment differences she had with Das' management style." (There is simply no evidence that Ms. Ewald "resisted and resented the actions

of her new supervisor, Das..." Such a subjective judgment hinges on the credibility of witness testimony about relations between Ms. Ewald and Mr. Das at the time. Credibility and demeanor assessments of this type are simply absent from the summary judgment process in this case. Moreover, Ms. Ewald directly refuted these issues in her affidavit at ¶'s 18-21, 31-32, 38-39, 43-45, 48-50, 53-54. J.A. at 144-51.)

- "Ewald does not deny that she threatened to erase a federal grant package after one of her disciplinary notices."

- "She offers no support for her contention that her extended absence in August 1988 was for sick leave." (Mr. Das states that Ms. Ewald's reasons for her absence during the period of August 1, 1988 through August 12, 1988 were not

"adequate or satisfactory." Ms. Ewald in her affidavit stated that she called in during this period and utilized her sick leave. In this instance the District Court chose to believe Mr. Das over Ms. Ewald even though it had no objective reason for doing so. Clearly, without more than countering statements Ms. Ewald's version of the facts would have to be accepted over Mr. Das' for the purposes of summary judgment. Gordon v. Leeke, 574 F.2d 1147, 1152 (4th Cir. 1978). District Court opinion at 18, J.A. at 205, App. at 66a.)

Of critical importance is the fact that none of the bases asserted by the District Court to support Ms. Ewald's legitimate termination are in fact the bases relied upon by Virginia in making the termination decision. There is no dispute on this point as the official

disciplinary notices including the termination notice state, and must state under law and policy, the specific reasons for the discipline and eventual termination. None of the written notices lodged against Ms. Ewald which form the purported legal justification for her discharge contain the above-mentioned facts. Not one.

The Court of Appeals and the District Court failed to decide whether any one or more of the four specific alleged reasons for termination mentioned by the District Court and relied on and referenced by the Court of Appeals were actually reasons cited in any of the disciplinary notices upon which Ewald's termination was based (which they were not). Both courts failed to decide whether any of these four alleged reasons for discharge were

adequate grounds for the issuance of a disciplinary notice under Commonwealth policy (which they were not). Both Courts also failed to define the alleged reasons for discharge with enough clarity and specificity to enable a determination as to the seriousness of the alleged offense, or even what the offense was.

As a matter of law in a First Amendment case, a defendant employer should not prevail in a summary judgment motion by putting forth any set of purported reasons for terminating an employee, even if true, if they are substantially different from those reasons placed on the record and given to the employee at the time of termination. To hold otherwise would stand the concept of pretext and due process on their heads and allow the

employer to prevail by putting forth entirely new reasons for the termination after the fact. This is unfortunately, exactly what the Court of Appeals and the District Court have allowed.

Ms. Ewald clearly delineated in her affidavit that her alleged personnel infractions were pretextual and that she was denied any alleged pre-termination opportunity for her to meaningfully present her side of the story. These central issues are strongly contested and clearly in dispute. See, Ewald affidavit ¶'s 28-29, 32, 35, 39-50, J.A. at 147-49.

The Court of Appeals articulated the standards of review for determinations via summary judgment in its opinion. Ewald v. Department of Waste Management, 91-1583 (4th Cir. 1992) (slip op. at 5), App. at 9a-10a.

Ms. Ewald generally agrees with the Court's articulation of the standards for summary judgment and review of summary judgment decisions. The standards articulated by the courts below in their opinions represent well-settled principles of law established by both the U.S. Supreme Court and the various Circuits.

In its opinion the Court of Appeals refers to and relies upon the statements of Ms. Ewald's former supervisors (Cynthia Bailey and K.C. Das) in concluding that "[i]t is apparent that Ewald's job performance problems began at least one year before her first contact with the EPA." Ewald, 91-1583 (slip op. at 7-8), App. at 18a. The Court's erroneous and disputed factual conclusion played an important role in its "but for" analysis of Ms. Ewald's

First Amendment claim.

Ms. Bailey, the former Executive Director of the Department of Waste Management, alleged in her affidavit that 1) Ms. Ewald's performance problems began in 1986, 2) EPA had complained about Ms. Ewald, and 3) that "she had counselled Ms. Ewald about her performance." Ewald, 91-1583 (slip op. at 7), App. at 17a. Ms. Ewald directly disputed these unsubstantiated allegations.

In her affidavit opposing summary judgment, Ms. Ewald challenged any notion that she had performance problems or was advised by Ms. Bailey of any areas of concern. Joint Appendix (J.A.) at 144-146 (Ewald's affidavit ¶ 1-16). Specifically, Ms. Ewald testified in her affidavit that through the 1985 to 1986 period she received "excellent"

performance reviews. J.A. at 145-146 (Ewald Aff. ¶ 11, 15). Moreover, she testified that "[a]t no time during this period was I counseled, warned or disciplined by either Bailey or Wickline [Ms. Ewald's first supervisor] regarding any aspect of my conduct or performance." J.A. at 146 (Ewald Aff. ¶ 16). The appellate court must search the record for facts in dispute and draw all inferences in favor of a plaintiff who opposes summary judgment. Ottensmeyer v. C&P Tel. Co., 756 F.2d 986, 992 (4th Cir. 1985). The Court of Appeals did not do that here.

The Court of Appeals also relies on the unsubstantiated statements of Mr. Das (the person accused by Ms. Ewald of wrongdoing) and his evaluation that Ms. Ewald "failed to provide the support and cooperation he expected." Ewald, 91-

1583 (slip op. at 7-8), App. at 17a. However, Ms. Ewald directly disputed the nature of the relationship between herself and Mr. Das in her affidavit. Ms. Ewald testified in her affidavit that Mr. Das' actions "controverted federal and state policies and laws," and he improperly charged work on non-EPA grant tasks "to that grant," "engaged in the hiring of employees who were unqualified," and excluded her from "hiring selections even for positions under [her] supervision." J.A. at 146 (Ewald Aff. ¶ 18-21). Perhaps Mr. Das was expecting cooperation in activities that were not proper and objection to which would be protected. This is a matter to be left to the jury.

Neither Mr. Das nor Ms. Bailey offered anything other than their direct testimony through affidavit on these

contested issues of fact. In essence, it is their word against Ms. Ewald's. Consequently, Ms. Ewald's version of these events must prevail for summary judgment purposes. See Fed.R.Civ.P. 56; U.S. v. Diebold, Inc., 369 U.S. 654 (1962); Greear v. Loving, 538 F.2d 578 (4th Cir. 1976). By relying on the statements of Das and Bailey which Ewald refutes, the Court of Appeals and the District Court have failed to examine the record in the light most favorable to Ms. Ewald.

One of the most fundamental issues before the District Court and the Court of Appeals was whether or not the written notices provided by the Department of Waste Management (DWM) could be relied upon as a basis for deciding, as a matter of law, that Ms. Ewald was justifiably terminated both in

terms of her First Amendment and Due Process claims. The Court of Appeals concluded that "Ewald's employment history with the DWM was replete with written disciplinary notices detailing her deficiencies. Ewald surpassed the minimum of three Group I disciplinary notices and one Group II disciplinary notice that were sufficient to terminate her under DWM policy prior to the August 29, 1988, disciplinary notice." Ewald, 91-1583 (slip op. at 9), App. at 23a. Here the Court of Appeals is accepting the written notices as if they are true and uncontested.

Nothing could be further from the truth. The Court of Appeals goes on to reason that "[t]he relevant objective fact in this case is that Ewald had accumulated adequate notices of sufficient severity to warrant

termination under DWM policy." Id. at 10; App. at 26a-27a. This reasoning simply ignores, without explanation or legal justification, Ewald's direct dispute of the validity of the written notices.

Concerning the written notice dated November 5, 1987 Ms. Ewald testified in her affidavit: "I asked Das for evidence supporting his charges in the 11/5/87 written notice. No evidence was provided. I grieved the written notice, gave an accounting of the facts and offered testimony from witnesses which refuted the charges, but was summarily denied relief or explanation by Das and Bailey." J.A. at 147 (Ewald Aff. ¶ 28-29). This notice followed the day after Ms. Ewald met with EPA officials to complain about Mr. Das' mismanagement of the Superfund program. Id. (Ewald Aff.

¶ 25). An act of retaliation that follows a protected act, such as communicating with the EPA, raises a genuine issue of material fact in the summary judgment context. Donahue v. Windsor Locks Board, 834 F.2d 54, 57-59 (2nd Cir. 1987); Eichman v. Indiana State University, 597 F.2d 1104, 1108-1109 (7th Cir. 1979).

With regard to the written notices dated April 13, 1988 and July 11, 1988 Ms. Ewald provided the following testimony: "I continued to air my complaints ... I was subjected to escalating harassment and retaliation ... During this period, I received a number of written notices, making vague and incorrect allegations against me. In each and every instance I demanded the basis or evidence for such notices, but received no response. To the extent

possible due to the vagueness of the charges stated, I provided refuting documentation in every instance. J.A. at 147-148 (Ewald Aff. ¶ 30-32). The Fourth Circuit has held that vague notices which give only general or categorical allegations ("catch all" allegations such as "other incidents") are not sufficient to satisfy due process. Linton v. Frederick County, 964 F.2d 1436, 1441 (4th Cir. 1992).

The July 22, 1988 written notice was issued following Ms. Ewald's dispute with Ms. Bailey about the condition of the Commonwealth's hazardous waste site known as Cheatham Annex. J.A. at 148 (Ewald Aff. 33-34). This timing again raises a genuine issue for trial. See, Donahue and Eichman, supra. Ms. Ewald testified: "On the afternoon of July 22, 1988, I received a written notice

alleging disruptive behavior at a meeting, which in fact, never took place. I was suspended for a one week period beginning July 25, 1988. The suspension was taken in lieu of termination, which I construed, along with the non-existence of the alleged incident, to mean that although, I was being harassed in retaliation for my opposition to improper actions of DWM officials, those officials realized that they could not justifiably, and therefore would not, terminate my employment." J.A. at 148 (Ewald Aff. ¶ 35-36).

Finally, concerning the terminating written notice dated August 29, 1988, Ms. Ewald was first able to contest the notice through the post-termination grievance process. J.A. at 149 (Ewald Aff. 46-50). However, disgusted with

the one-sided nature of the grievance process as implemented by Bailey and Das, Ms. Ewald chose to challenge this notice and her termination before the U.S. Department of Labor. J.A. at 150 (Ewald Aff. ¶ 51, 53). That adjudication is still in process.

Undoubtedly, had Ms. Ewald been permitted an opportunity for discovery prior to preparing her opposition to summary judgment, she would have submitted additional evidence to support her position. However, such evidence is not necessary for the purposes of summary judgment because Ms. Ewald's affidavit adequately takes issue with the validity of each of the written notices. In fact, as a pro se litigant, who does not practice law, Ms. Ewald is permitted some flexibility in drafting her documents. The court must interpret

them in a liberal context most favorable to her. Greear, 538 F.2d at 580; Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). Consequently, and as a matter of law, the lower courts should not have relied on the written notices as uncontested facts, as they did in their opinions. The issues involving the written notices are clearly material issues in dispute and cannot provide a supportive basis for summary judgment on Ms. Ewald's First Amendment claims.

Neither can the "objective fact" that five written notices were filed against Ewald support summary judgment on her Due Process claim. Ms. Ewald disputed in her affidavit that any of the written notices were valid. She also disputed that she had been informed of the specific charges at the time of each notice. She disputed that she had

been given an explanation of the evidence against her at the time of each written notice. J.A. at 144-51 (Ewald Aff. ¶ 28, 29, 32, 39).

II. The Fourth Circuit's Failure to Enforce Fed.R.Civ.P. 5 And 77 Also Calls for the Exercise of this Court's Power

Fed.R.Civ.P. Rule 77(d) requires that immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided by Rule 5 upon each party. Fed.R.Civ.P. Rule 5(b) requires that service to a party or her attorney be made by delivery or mail. Ms. Ewald did not receive notice of the District Court's pre-trial Order until after time limits under the Order for some types of discovery and other procedural requirements had already lapsed. Ms. Ewald did not receive proper notice of

the District Court's order until the first week of March 1991, a full three months after it was entered.

The Supreme Court, in cases dealing with the question of notice, has uniformly held that notice must be provided at a meaningful time and in a meaningful manner so parties can raise their objections. Mullane v. Central Hanover Bank, 339 U.S. 306, 314 (1950); Mennonite Board of Missions v. Adams, 462 U.S. 791, 799 - 800 (1983) (specifically noting "that particularly extensive efforts to provide notice may often be required when the state is aware of a party's inexperience or incompetence."); Greene v. Lindsey, 456 U.S. 444, 449-454 (1982). Further, in Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) the court held that a person must have proper notice

and an opportunity to contest a matter before her/his interests are affected.

Ms. Ewald brought her case to the District Court pro se. She has never done any work in the legal field that exposed her to the District Court's particular form of practice and procedure. In fact, prior to her experience in this case, Ms. Ewald had never appeared in court. She could not be expected to know that the District Court had a standardized pre-trial order that is provided in most every civil case. See, also, Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) (holding that summary judgment was not appropriate where pro se litigant was not advised that he had a right to file counteraffidavits).

The fact that Ms. Ewald received the District Court's pre-trial order at

a point in time when it was too late to obtain the same discovery opportunities her opponents had utilized implicates fundamental questions of fairness beyond the issue of proper notification. It is the effect of the failure to provide proper notification that must be closely examined. As clearly explained in her Emergency Motion, Ms. Ewald's pre-trial strategy was completely overwhelmed by the interjection of a pre-trial order that was designed to provide a measured and prompt pace to the litigation. By the time she received the order the process was so set in stone and she was so pressured by defendants litigation agenda that it was impossible for her to obtain discovery regarding any of the causes of action in her complaint.

Such gross inequities do not normally occur when parties are

represented by counsel. However, a few courts have dealt with similar situations, and their analyses make clear the validity of Ms. Ewald's arguments. See e.g., In the Matter of The Complaint of Bankers Trust Company, 752 F.2d 874, 890-91 (3rd Cir. 1984).

Moreover, in cases where parties have not been party to the preparation of a pre-trial order, or were not fully informed about the nature and agenda of a pre-trial hearing the courts have uniformly held that their Fifth Amendment rights have been violated. Miera v. First Security Bank of Utah, 776 F.2d 902, 906-907 (10th Cir. 1985) (party was not given a fair opportunity to resist a pre-trial order which was the basis for partial summary judgment); Aetna Insurance Company v. Hartshorn, 477 F.2d 97, 100 (5th Cir. 1973) (party

that chose not to attend hearing was denied due process when hearing decided merits of case, but party was not informed that merits would be argued at hearing). Like the party in Miera, Ms. Ewald did not have a fair opportunity to contest or seek to modify the contents a pre-trial order.

In assessing Ms. Ewald's right to notice of a pre-trial order and adequate opportunity for pre-trial discovery, the Appellate Court concluded that "[a]lthough we find that Ewald was originally entitled to notice by mail of the pretrial order, we do not find that the district court abused its discretion in its denial of Ewald's emergency motion after consideration of all the factors involved in this case." Ewald, 91-1583 (slip op. at 6), App. at 14a. Specifically, the Court of Appeals

refers to the timing of Ms. Ewald's emergency motion, and some of the factors the District Court cited in denying her motion. Id. These references demonstrate a misunderstanding of the facts.

Concerning the timing of her emergency motion, the Court of Appeals raises the concern that the motion was not filed by Ms. Ewald "until the day before the summary judgment hearing." Id. The Court's concern seems to be that Ms. Ewald slept on her rights, implying that earlier action may have been better received. Several facts make clear that Ms. Ewald acted as promptly as the circumstances would allow.

First, prior to actually receiving the pre-trial order, during the week of March 4, 1991, Ms. Ewald contacted a

Clerk of the District Court on several occasions to determine if a discovery schedule had been set by the District Judge. J.A. at 118.

Second, Ms. Ewald's first formal notification to the District Court that her rights had been seriously affected by the Court's failure to serve the pre-trial order was presented orally and in writing on March 25, 1991. J.A. at 120. This notification was approximately two weeks after Ms. Ewald actually received the pre-trial order, and over two weeks before the hearing on summary judgment.

Next, the lower courts' observation that Ewald was aware of the rules and time limitations is, with all due respect, meaningless and demonstrates a basic misunderstanding of Ms. Ewald's situation. Of course, she was able to discuss the requirements of the pre-

trial order once it was in her possession.

Ms. Ewald was entitled to notice of the District Court's pre-trial order and the Court of Appeals for the Fourth Circuit should be required to direct the District Court to adhere to the federal rules of procedure and the requirements of due process.

III. The Fourth Circuit Has Abandoned this Court's Decision in Cleveland Board of Education v. Loudermill

The District Court and Court of Appeals correctly acknowledge the controlling rule on pre-termination procedural Due Process in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), and acknowledge that Virginia law gives non-probationary public employees such as Ms. Ewald a protected property right in employment.

Both lower courts also acknowledge that Loudermill requires "some kind of hearing" before discharge, and requires notice of the charges, a summary of the employer's evidence, and an opportunity for the employee to present her side of the story prior to termination. Court of Appeals Opinion at 8, App. at 18a-20a; District Court Opinion at 26-27, App. at 66a-68a.

The District Court notes erroneously, however, that the termination notice "contained several specific recitations of Ewald's most recent shortcomings. It also referred back to the past notices and other informal requests for improved performance." District Court Opinion at 20, App. at 69a-70a. This holding is fundamentally erroneous because only one of the allegations in the termination

notice was specific and that one was entirely new -- regarding fiscal mismanagement. The remaining allegations were vague. It is unclear whether the District Court relied on the attachment to the termination notice but that attachment had been previously submitted with a prior notice which was found to be false and was rescinded in toto. Its renewed submission did not add clarity to the notice but rather confusion.

The District Court erred in finding that the first two prongs of the due process test were met because the termination notice was extremely vague for all allegations but the fiscal, and even the fiscal was still too vague to understand. Further, the fiscal allegation was presented to Ms. Ewald for the first time only a few hours

prior to her forced removal from the building under threat of arrest -- hardly adequate notice. The second prong was clearly not met because no evidence supporting the charges was presented to Ms. Ewald and neither was any evidence explained to her, as required by Loudermill.

Due Process requires more than a mere momentary encounter with a hostile supervisor who hands over a vague termination notice with a one page attachment that was removed from a prior reprimand that had been completely rescinded, having been found to be factually false. See, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 544-547 (1985). Due process requires more than a momentary "opportunity" for the employee to appeal to the supervisor who has just decided

to terminate the employee after the employee has brought charges of wrongdoing against the very same supervisor. Id.

The District Court finds the third prong of the Loudermill test problematic when actually it clearly weighs in Ms. Ewald's favor because the opportunity to give her side of the story required by Loudermill was non-existent in Ms.Ewald's case, as she explained in her affidavit. The District Court, and the Court of Appeals through its affirmance of the District Court's decision, misread Loudermill to hold that "even the briefest face-to-face encounters satisfies due process" when prior disciplinary notices have been issued to the employee and when the employee has post-termination grievance procedures available to her. App. at 71a. The

rule in Loudermill however, is different and clear: The pretermination hearing "should be an initial check against mistaken decisions -- essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-46 (citations omitted). "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." Id at 546.

Both lower courts here make a fundamental error of logic in holding on the one hand that the actual reasons for Ewald's termination were specific reasons offered post hoc by the Commonwealth and not found in the pre-termination notices and on the other

hand holding that due process has been provided by providing Ms. Ewald a chance to respond to the charges stated in the notices. Justice and due process do not allow the Commonwealth or the courts to have it both ways.

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), also requires an opportunity to respond when the termination notice is provided, not just at the time of each prior offense. Even assuming, arguendo, that the issuance of the four pre-termination notices were all that Loudermill and state policy required, Ewald still had the right to present arguments opposing termination that might have convinced DWM not to terminate her. Ms. Ewald, if given the opportunity, would have argued that the prior written notices were false, and that the new charges

regarding her causing an alleged budget deficit in the Superfund program were likewise false. Similarly, she would have rebutted the post hoc reasons had they been made available at the time. "Neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss [her], notwithstanding its authority to do so." Loudermill, 470 U.S. at 544.

The Court of Appeals failed to understand the importance of and focus upon the new charge leveled against Ms. Ewald in the final (August 29, 1988) written notice. She did not receive, as her affidavit demonstrates, any pre-termination opportunity to review evidence concerning this charge or even discuss it with her supervisors. J.A. at 149 (Ewald Aff. ¶ 42-46). Loudermill

requires such a pre-termination process that provides an opportunity to respond to all the actual reasons for termination. 470 U.S. at 544.

Equally in dispute as the facts and issues detailed above are the facts concerning Ms. Ewald's opportunities to contest the charges against her that led to her termination. The Court of Appeals concluded "Ewald had no fewer than four pretermination opportunities to respond to the charges. These opportunities provided Ewald with an adequate means of contesting such notices ..." Ewald, 91-1583 (slip op. at 10), App. at 24a. Particularly troubling is the Court of Appeals' determination that the four pretermination opportunities were adequate. These so-called opportunities were clearly deficient and their

adequacy was directly disputed by Ms. Ewald. See J.A. at 144-51.

Specifically, Ewald challenged the process provided for each and every written notice. Regarding the November 5, 1987 notice, Ms. Ewald stated that she was not provided any evidence to support the charge against her and that her evidence to counter the charge was summarily refused. J.A. at 147 (Ewald Aff. ¶ 28-29). Concerning the April 13 and July 11, 1988 written notices, Ms. Ewald demanded to know the basis or evidence to support the notices, but received none. J.A. at 148 (Ewald Aff. ¶ 32).

Similarly, Ms. Ewald challenged that the incident alleged to be the basis for the July 22, 1988 notice, never occurred. Id. (Ewald Aff. ¶ 35-36). And with regard to the final

(August 29, 1988) written notice, Ms. Ewald testified that the allegations were "untrue on the face." She further describes how she was summarily, and without explanation of any evidence against her, forced to leave. J.A. at 149 (Ewald Aff. ¶ 42-48).

CONCLUSION

The Commonwealth and both lower courts have relied on post hoc reasons for Ms. Ewald's termination that were not stated in any pre-termination notice. This is evidence of pretext which, rather than disproving that Ewald would not have been discharged "but for" her protected speech, actually provides evidence of the required "but for" relationship, certainly enough to survive summary judgment, even if the specifics were not otherwise placed in

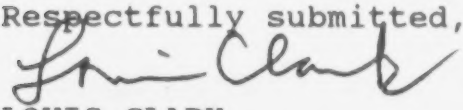
dispute by Ms. Ewald's affidavit. The Fourth Circuit has held that when such evidence of pretext is present, summary judgment is inappropriate. Linton v. Frederick County, 964 F.2d 1436, 1441 (4th Cir. 1992). The Ewald decision is in conflict with Linton.

Because the Fourth Circuit, like the District Court below it, has relied on reasons for termination that were not presented to Ms. Ewald prior to termination, both courts have totally abandoned Loudermill. The Fourth Circuit has further abandoned Loudermill in following a rule that allows pre-termination notice requirements to be satisfied by a series of leisurely notices of deficiency none of which put the employee on notice that she is about to be terminated and then allow abrupt termination without any opportunity for

her to make her case when the reality of termination is apparent.

This is not the process contemplated by Loudermill, and it is a process that is easily abused to silence free speech and environmental whistleblowing. The Fourth Circuit rule is a dangerous one that deserves review by this Court. For all the reasons stated herein, Petitioner Pauline Ewald respectfully requests this Court to grant her Petition for Certiorari.

Respectfully submitted,



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Dated: November 23, 1992

United States Court of Appeals
For the Fourth Circuit
No. 91-1583

PAULINE M. EWALD,

Plaintiff-Appellant,

v.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF WASTE MANAGEMENT;
CYNTHIA V. BAILEY; K.C. DAS;
WINSTON B. EVANS,

Defendants-Appellees.

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court has requested a poll on the suggestion for rehearing in banc and the original judicial panel has voted to deny the petition for rehearing. Therefore, the petition for rehearing with suggestion for rehearing in banc is hereby denied.

Sol Blatt, Jr.
Senior United States District Judge

August 25, 1992

United States Court of Appeals,
Fourth Circuit

PAULINE M. EWALD, Plaintiff-Appellant, v. DEPT. OF WASTE MANAGEMENT, Commonwealth of Virginia; Cynthia V. Bailey; K.C. Das; Winston Evans, Defendants-Appellees.	No. 91-1583

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-90-494-R)

Argued: March 3, 1992

Decided: July 22, 1992

Before SPROUSE, Circuit Judge, KISER, United States District Judge for the Western District of Virginia, sitting by designation, and BLATT, Senior United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

Pauline M. Ewald (herein "Ewald"), plaintiff below, appeals from the entry of summary judgment in favor of the Commonwealth of Virginia, Department of Waste Management (herein"DWM"), Cynthia V. Bailey (Director), K.C. Das (Supervisor), and Winston B. Evans (Bailey's secretary), by the United States District Court for the Eastern District of Virginia. Ewald also appeals from the denial of her motion for relief from the time constraints of the pretrial order. Ewald alleged below that the District Court denied her Fifth Amendment right to engage in pretrial discovery. Ewald also alleged that her rights of free speech and due process were violated when she was terminated from her employment. Additionally, Ewald

set forth various state law claims in relation to her termination. Ewald contends that her termination was prompted by her complaints of agency mismanagement, while the defendants assert that she was terminated for poor job performance. We affirm the judgment of the District Court in all respects.

On October 16, 1990, the district court issued a notice scheduling a pretrial conference for October 25, 1990. The pretrial conference was rescheduled at Ewald's request to permit her to obtain counsel, and on November 8, 1990, a second notice was issued scheduling the pretrial conference for November 29, 1990. Ewald appeared without counsel at this rescheduled pretrial conference and the court issued a pretrial order. One day prior to a hearing set on defendant's motion for summary judgment, and fifteen days

before the trial date, Ewald filed an emergency motion for relief from the pretrial order, claiming that she was denied adequate opportunity for discovery, but the district court denied her motion.

From September, 1986, to August, 1988, Ewald was employed by DWM as Manager of the Superfund Pre-Remedial Program. Her responsibilities included supervision of site investigation, environmental testing, preliminary assessment, and ranking of hazardous waste sites in Virginia. Ms. Cynthia Bailey was the Director of DWM in 1986 when Ewald began her employment. In her affidavit, filed with the summary judgment motion, Bailey stated that she became concerned with Ewald's job performance as early as the fall of 1986, and that on at least two occasions she had counselled Ewald about her poor

job performance.

In late 1987, Ewald first contacted the EPA to report alleged acts of grant misappropriation within the DWM. In April, 1987, Dr. K.C. Das became Ewald's direct supervisor. In his affidavit, filed with the summary judgment motion, Das stated that, from the day of his arrival, he received only minimal support and cooperation from Ewald. He further stated that on numerous occasions he instructed Ewald to accomplish program directives and that she either did not respond or responded in an untimely manner. In August, 1987, Das evaluated Ewald and gave her a rating of 23, which he stated was only marginally satisfactory.

DWM had a standing policy that an employee could be terminated if that employee received four Group I disciplinary notices, or one Group II

disciplinary notice combined with three Group I disciplinary notices. During the period from November 5, 1987, to August 29, 1988, Das issued six disciplinary notices to Ewald which are listed as follows:

1.November 5, 1987 -Group I notice issued for disruptive behavior at a meeting.

2.April 13, 1988 -Group II notice issued for consistently failing to perform duties and provide notice of absences during office hours.

3.July 11, 1988 -Group I notice issued for failure to be at work, i.e., arriving late and leaving early without informing staff.

4.July 22, 1988 -Group I notice issued for disruptive behavior at a meeting.

5.August 25, 1988 -Group I notice for unsatisfactory attendance.[FN1]

6.August 29, 1988 -Group I notice issued for failure to produce weekly activity reports for several weeks and to respond to an outstanding request to develop an annual program plan. Ewald was previously reminded on both July 25, 1988, and April 16, 1988, of the request to develop the annual program plan. [FN2]

On August 29, 1988, Dr. Das requested a meeting with Ewald. During the meeting, Ewald was given the August 29, 1988, termination notice described above. Ewald refused to sign this notice to acknowledge its receipt. In his affidavit, Dr. Das stated that he told Ewald that she was being terminated when he gave her the notice. The substantive conversation between Ewald and Das seems to have ended at that point. In her affidavit, Ewald stated

that she then attempted to discuss the charges and the termination action with her Director, Ms. Bailey, but that Ms. Bailey's secretary had informed Ewald that Ms. Bailey was unavailable to meet with her.

In reviewing the district court's grant of summary judgment, we apply the same standard applied by the district court under Federal Rule of Civil Procedure 56(c). Ottensmeyer v. Chesapeake & Potomac Tel. Co., 756 F.2d 986, 992 n.12 (4th Cir. 1985). Summary judgment is appropriate "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In assessing the correctness of the court's grant of summary judgment, we must examine the record in a light most favorable to the party opposing the motion. Smith v. University of North Carolina, 632 F.2d 316, 338 (4th Cir. 1980).

In reviewing the district court's denial of Ewald's emergency motion for relief from pretrial order, the standard to be applied is whether the district court abused its discretion in applying Federal Rule of Civil Procedure 16 governing pretrial conferences. Sadowski v. Bombardier, Ltd., 539 F.2d 615 (7th Cir. 1976).

I.

Ewald first argues that the

district court erred in its denial of her emergency motion for relief from the court's pretrial order. The pretrial conference had been delayed approximately one month at Ewald's request. Ewald appeared at the pretrial conference, but alleged that she did not receive a copy of the pretrial order until a full three months after it was entered. DWM does not argue that Ewald received proper notice of the order by mail, but DWM argues instead that Ewald was not entitled to notice by mail. We find DWM's argument unpersuasive on that point. Pursuant to Federal Rule of Civil Procedure 77(d), the clerk of court must immediately serve a notice of entry of an order upon each party not in default.

In footnote six of its order, [FN3] the district court cited some of the factors it considered in denying Ewald's

emergency motion. One factor was that Ewald possessed a law degree and demonstrated competence in both oral advocacy and legal writing and analysis. The court also stated that Ewald's motion and brief indicated Ewald's awareness of the rules and time limitations of which she complains. In addition, the court noted that Ewald had repeatedly attempted to delay this case, and that she was reminded in court of her obligations to prosecute her case and to respond to the motions filed by the defendants. The court indicated that Ewald's only response to defendants' motions was to seek further delay, and that Ewald had approximately eight months since filing her complaint to offer any deposition testimony or affidavits to corroborate her material allegations, but she had not done any of this.

From the record, it appears that Ewald knew about the pretrial order at least one month before the motion for summary judgment was heard, but did not file her emergency motion until the day before the summary judgment hearing. The determination as to whether or not parties should be held to pretrial orders is a matter left generally to the discretion of the district court. Sadowski v. Bombardier, Ltd., 539 F.2d 615 (7th Cir. 1976); De Laval Turbine, Inc. v. West India Industries, Inc., 502 F.2d 259, 263 (3rd Cir. 1974). Although we find that Ewald was originally entitled to notice by mail of the pretrial order, we do not find that the district court abused its discretion in its denial of Ewald's emergency motion after consideration of all the factors involved in this case.

II.

Next, Ewald asserts that, in response to defendant's summary judgment motion, she raised material issues of fact, concerning her First Amendment claim that she was terminated because she engaged in protected speech as a "whistle-blower." The district court rejected Ewald's argument, employing the analysis outlined in Huang v. Board of Governors of University of North Carolina, 902 F.2d 1134 (4th Cir. 1990). In Huang, this Court held that, in order to prevail on a First Amendment whistle-blower claim, the plaintiff must satisfy a three-prong test: (1) plaintiff's expressions must have involved a matter of public concern; (2) plaintiff must have been deprived of some valuable benefit; and (3) "but for" the protected expression, the employer would not have taken the

alleged retaliatory action.

We find that the district court properly rejected Ewald's protected speech claim because she failed to meet the third prong of this test. This court has described the causation factor as a rigorous requirement:

> [I]t is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that "but for" the protected expression, the employer would not have taken the alleged retaliatory action.

Id., citing Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 417 (1979).

For summary judgment purposes, the district court found that Ewald had made statements of public concern prior to her discharge, but that these statements were not the "but for" cause of her discharge. We agree with the district court's finding that Ewald met only the first two prongs of the Huang test, and

that her claim failed to meet the "but for" prong of that test.

In her affidavit, Ewald stated that her first report to the EPA of alleged wrongdoing concerning grant mismanagement occurred on October 19, 1987. However, it appears from the record that Ewald's job performance problems began in the fall of 1986 while her contact with the EPA admittedly did not begin until the fall of 1987.

Ms. Bailey, Ewald's Director, stated in her affidavit that she became concerned with Ewald's job performance as early as the fall of 1986, and that on at least two occasions she had counselled Ewald about her performance. Specifically, Ms. Bailey stated that EPA had complained about Ewald's failure to achieve grant commitments that Ewald had made to EPA and, also, about the difficulty of working with Ewald.

Additionally, as previously set forth herein, in April, 1987, Dr. K.C. Das became Ewald's supervisor and it was his view that she failed to provide the support and cooperation he expected of her.

These facts support the district court's finding that the "but for" prong of Huang was not met. It is apparent that Ewald's job performance problems began at least one year before her first contact with the EPA. Under these circumstances, we affirm the district court's finding that Ewald did not meet the rigorous causation standard of Huang.

III.

Finally, Ewald asserted that her rights of procedural due process were violated because she did not receive a pretermination opportunity to respond to the charges listed on her termination

notice. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985), the Supreme Court held that a public employee with a property interest in continued employment who is offered post termination administrative procedures must, nevertheless, before termination be given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his or her side of the story." Loudermill, 470 U.S. at 546. A pre-termination hearing is necessary in order to balance the competing interests at stake: "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination." Id. at 542-543.

When post-termination administrative procedures are afforded, such pretermination procedure functions only as "an initial check against mistaken decisions-essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545-46. The pretermination process need not resolve the propriety of the discharge. Id. at 545. See Gniotek v. City of Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986) ("Notice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstance of the case."), cert. denied, 481 U.S. 1050 (1987). In this regard, the Tenth Circuit has observed: "The pretermination hearing is merely the

employee's chance to clarify the most basic misunderstanding or to convince the employer that termination is unwarranted. The pretermination hearing is intended to supplement, not duplicate, the more elaborate post-termination hearing." Powell v. Mikulecky, 891 F.2d 1454, 1458 (10th Cir. 1989).

The Fourth Circuit itself has indicated that the requirements to comply with Loudermill are minimal. See e.g., Garraghty v. Jordan, 830 F.2d 1295, 1302 (4th Cir. 1987) (holding that Loudermill requires neither a full evidentiary hearing with witnesses nor a neutral decisionmaker). Very recently in Linton v. Frederick County, No. 912189 (4th Cir. May 22, 1992), this court adopted the analysis employed in Seibert v. Oklahoma ex. rel. Univ. of Oklahoma Health Sciences Center, 867

F.2d 591 (10th Cir. 1989), in that the court considered the employment history of the plaintiff in determining whether the plaintiff had received a pretermination hearing. Similar to the facts of this case, the court in Seibert faced a plaintiff with "an extensive history of warnings," Id. at 598. Examining the last several months preceding Seibert's termination, the court concluded: "We believe that the totality of the procedures and opportunities which the University afforded the plaintiff were sufficient to satisfy constitutional requirements. Plaintiff was not fired out of the blue. Plaintiff was not fired for reasons he did not know." Id. at 599. In the same vein, a recent published decision involving several warnings over a two-month period found that due process requirements were satisfied when

examining the process as a whole. See Aronson v. Gressly, 921 F.2d 907 (10th Cir. 1992). These cases are illustrative of problems in employment relationships that develop over time. The procedures available to an employee in responding should, therefore, also be examined over time.

When applying Loudermill to the events of August 29, 1988, and to Ewald's employment history as a whole, the record establishes that Ewald had an opportunity to respond that met or exceeded the minimal requirements of Loudermill. Ewald's employment history with the DWM was replete with written disciplinary notices detailing her deficiencies. Ewald surpassed the minimum of three Group I disciplinary notices and one Group II disciplinary notice that were sufficient to terminate her under DWM policy prior to the August

29, 1988, disciplinary notice. In connection with these disciplinary notices, Ewald had no fewer than four pretermination opportunities to respond to the charges. These opportunities provided Ewald with an adequate means of contesting such notices, as shown by her success in removing one charge that she failed to report to work in a timely manner. Ewald was aware that she had an opportunity to respond to each of these notices; she initiated action contesting the very first notice. While our decision does not turn on this factor, it is interesting to note that Ewald refused to even sign for the receipt of the notice of July 22, 1988, and the final notice of August 29, 1988. Due process requirements are not violated merely because the plaintiff fails to take advantage of available procedures. See, e.g., Bohn v. County

of Dakota, 772 F.2d 1433, 1441 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir. 1982), cert. denied, 459 U.S. 1017 (1982).

It is clear that these notices detailing disruptive behavior and a failure to perform her duties made Ewald liable to discharge even in the absence of the additional charges detailed in the August 29, 1988 notice. This was stated directly to Ewald in the notice she received on July 22, 1988: "The fact that [Ewald] now has three active Group I offenses and one active Group II offense are grounds for automatic dism[iss]al."

When the state has exceeded the requirements of due process by providing the employee with an opportunity to respond to each of the violations that, taken together, can lead to termination,

the pretermination requirements of Loudermill are fully satisfied. Due process does not require further interference with the state's recognized interest in ridding itself of incompetent and disruptive employees. As the Supreme Court stated in Loudermill: "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 470 U.S. at 546.

In addition, when discussing the requirement for a hearing, Loudermill distinguishes terminations based on arguable issues from those based on objective facts. Id. at 544 & n.9. The relevant objective fact in this case is that Ewald had accumulated adequate notices of sufficient severity to warrant termination under DWM policy.

She was accorded due process in connection with each of these notices. Loudermill does not require an additional hearing when the only remaining issue is the objective fact that Ewald had accumulated sufficient notices to be terminated. [FN4]

In sum, upon a thorough review of Ewald's extensive history of both oral and written warnings, this court concludes that Ewald was afforded an adequate pretermination hearing under the standards enunciated in Loudermill and interpreted by later cases decided by this court. It is clear that Ewald was aware of the reasons which formed the basis for her termination and that she was not fired out of the blue. She had many opportunities to respond during the approximately two year period from the fall of 1986, to her date of termination on August 29, 1988. We

conclude that the opportunities for pretermination hearings provided to Ewald adequately addressed the underlying interests outlined by the Loudermill court. Id. at 542-543. Consequently, the order of the district court is

AFFIRMED.

FN1. This notice was rescinded as noted on the August 29, 1988, notice, because Ewald made a verbal presentation of a formal grievance, and was able to provide proof to refute this charge.

FN2. This notice had an attachment, dated August 25, 1988, showing two items. The first item was the unsatisfactory attendance charge with a handwritten notation that the charge was no longer relevant. The second item contained charges of unsatisfactory job performance as listed in number 6 above.

FN3. See page 201 of the Joint Appendix.

FN4. Reversing the factual situation found in Loudermill, 470 U.S. at 544 and n.9, the United States Supreme Court indicates that where a termination is based on objective facts, rather than on subjective facts, an additional pretermination hearing is not necessary when earlier pretermination hearings have been given to the same employee.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA,
RICHMOND DIVISION

PAULINE M. EWALD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 3:90V0094
COMMONWEALTH OF VIRGINIA	)	
DEPARTMENT OF	)	
WASTE MANAGEMENT, et al.,	)	
	)	
Defendants.	)	
	)	

OPINION MEMORANDUM

April 22, 1991

April 22, 1991, Filed

James R. Spencer,
United States District Judge.

This matter is before the Court on defendants' motion for summary judgment. For the reasons discussed below, the motion will be granted, and plaintiff's motion for relief from the schedule of the pretrial order denied.

I.

Plaintiff Pauline Ewald complains that defendants subjected her to "an ongoing campaign of harassment and intimidation," culminating in her discharge, in response to her raising serious concerns about fraud, waste and abuse at the Virginia Department of Waste Management ("DWM"). She claims these acts violated her rights of free speech and due process, as well as assorted state law rights.

She invokes the court's jurisdiction under 28 U.S.C. @ 1331 (federal question). She makes her constitutional claims pursuant to Bivens v. Six Unknown Named Agents of Fed'l Bureau of Narcotics, 403 U.S. 388 (1971). n1

The remainder of this section describes the allegations of the

complaint as if true.

Ewald was employed by DWM as director of the Virginia Pre-remedial Superfund Program ("Pre-remedial Program"). The program is a state-run one, operated pursuant to a cooperative agreement with the United States Environmental Protection Agency ("EPA").

As director, Ewald observed "numerous improprieties" in:

> the administration of grant funds, the application of Federal environmental law and policy, in the application of required State and Federal procedures relating to fair hiring, and in abuse of due process relating to property interests in continued public employment.

Complaint at para. 9.

Ewald expressed her concerns to DWM supervisors, EPA agents, and co-workers who had the power to correct the problems. They did not, and instead sought to "actively discredit" Ewald.

Id. at paras. 9-10.

Ewald continued her complaints. In response, the defendants conspired with each other and others for the purpose of suppressing her constitutional rights. Specifically, they conspired to:

1) terminate Ewald's job without a "proper show of cause" and without due process;

2) retaliate against Ewald for her first amendment activities;

3) "conduct an improper campaign of harassment and intimidation" against her;

4) implement a "spying and surveillance" program against her, using her friends, associates and co-workers to gather "derogatory information" about her so as to "smear and discredit" her;

5) intentionally inflict emotional distress on her;

6) deprive her of due process by

"rejecting her complaints, punishing her for bringing them, and requiring her to engage in fruitless" grievance procedures; and, finally,

7) deprive her of her reputation and professional standing by defaming her through libel and slander.

Id. at para. 12.

After this melodramatic introduction, Ewald's complaint offers more specific factual assertions, as follows. n2

Ewald directed the Pre-remedial Program from January 1984 to August 1988, making use of her degrees in chemistry and law. Id. at paras. 15-16.

Ewald's responsibilities included supervision of site investigation, environmental testing, preliminary assessment and hazardous ranking of hazardous waste sites in Virginia, and bringing those sites to the attention of

the EPA.

Ewald "was instrumental" in developing the Pre-remedial Program and in acquiring the first EPA grant for it. She was "well respected" by staff, and received at least satisfactory performance ratings prior to her termination. She also received compliments from EPA officials, was called the Virginia Pre-remedial Program "one of the best in the country." Id. at paras. 18-21.

Ewald had "a contractual understanding and agreement with her Employer that her employment would not be terminated except for just cause." Id. at para. 22. The DWM also had a "standing official policy" permitting termination only after:

four valid Group I Notices of policy violation or poor performance, or one valid Group II Notice and three valid

Group I Notices.

Id. at para. 23.

DWM issued four valid Group I Notices and one Group II Notice, but these were "pretextual or simple error." It discharged her on August 29, 1988, without just cause. Id. at paras. 24-25.

Ewald's discharge followed 10 months of "unjustified personnel actions" in retaliation for her disclosures of agency misconduct. Id. at para. 32. Her termination was proceeded by "less than five hours notice," and threats of arrest for trespassing if she returned. Id. at para. 31.

Ewald seeks $ 1 million in compensatory damages for the constitutional violations, plus another $ 1 million in punitive damages, and another $ 2 million for the pendent state law claims of wrongful discharge,

libel and slander, and intentional infliction of emotional distress.

II.

Defendants submit three affidavits and related attachments on summary judgment. A description of facts supported by those items follows.

Defendant Cynthia Bailey was DWM director from July 1, 1986 to March 1, 1991. She states that Ewald was indeed the Pre-remedial Program manager until August 1988. After April 17, 1987, her direct supervisor was Dr. K.C. Das.

As early as the fall of 1986, Bailey "became concerned" with Ewald's performance and at least twice "counselled" her about her performance.

Specifically, Bailey states that the EPA "had complained about her failure to achieve grant commitments that she had made and the difficulty of

working with Mr. [sic] Ewald. In addition, Ewald had misrepresented her inability to obtain consent [apparently for testing] from an owner of a possible site."

These incidents prompted Bailey to ask Das to closely supervise the Pre-remedial Program once he arrived.

Ewald became "a management problem" because of performance and attendance shortcomings. She was issued four Group I and one Group II disciplinary notices, as described in the Virginia Employees' Standards of Conduct and Performance Policy, between November 5, 1987 and August 29, 1988.

Ewald initiated grievance procedures only in response to her first and last notices, but pursued neither of them to conclusion.

Bailey acknowledges she terminated Ewald's employment on August 29, 1988,

effective on that date. She made her decision on that date, based on her belief that all Ewald's disciplinary notices were justified.

Bailey denies Ewald's allegations, and states she has never prohibited or restrained Ewald's speech or association with others. She states Ewald was not discharged for allegations of agency mismanagement, but for "good cause" pursuant to the state employees grievance procedure, and for the reasons stated in her discipline notices.

Attached to Bailey's affidavit are documents purporting to show that the DWM had engaged in no misconduct, and that the U.S. Department of Labor had previously rejected Ewald's complaints.

First, there is an undated letter from Thomas Voltaggio, director of the Hazardous Waste Management Division for the Philadelphia regional office of the

EPA. It is addressed to persons with the Government Accountability Project ("GAP"); this appears to be a public interest group which filed the Labor Department complaint on Ewald's behalf. n3

GAP had raised concerns with a letter to Voltaggio on October 11, 1990, about Virginia's handling of the Virginia Emergency Fuel Storage Facility (VEFSF) in Williamsburg.

Voltaggio conferred with various state environmental and safety officials in responding to those concerns. His letter also refers to an article by Ewald called "Running Amuck."

GAP's first concern was that the state failed to report the presence of leaking petroleum or "PCB" contaminants after purchasing the VEFSF site from the Navy in May 1981. Virginia had no duty to report such things, Voltaggio wrote,

based on the applicable regulations and the results of a preliminary site investigation.

GAP also expressed concerns about misappropriation of EPA Pre-remedial Program grant monies. But the lab cost of analyzing VEFSF samples was not charged to EPA, Voltaggio explained. It was instead paid for by the Commonwealth, and there was thus no misappropriation.

The only hint of mismanagement EPA found involved "incorrect use of four Pre-Remedial Program Staff members" for work on the VEFSF in late 1986 and early 1987. EPA informed the DWM in 1987 that it did not approve of the "intermixing of programs (State and Federal)," Voltaggio added. K.C. Das followed up in April 1987 by initiating "separation of the pre-remedial and remedial programs." The EPA found this to cure

the "program intermix problem."

Lastly, Voltaggio wrote, there was no reason to place the VEFSF on the Superfund National Priorities List. Even assuming a "worst-case" scenario for contamination at the site, it still would not qualify for NPL listing.

Other documents relate to the Labor Department's investigation of Ewald's administrative complaint that she was discharged in retaliation for reporting DWM mismanagement and misconduct.

The Labor investigation concluded that Ewald's allegations were not provable because:

> Your termination was based on issues which were in existence prior to your reporting your concerns to the EPA. Your termination was based on problems with your performance, attendance, and behavior, all of which were documented both before and after you contacted EPA. These issues are unrelated to areas which fall within the scope of the EPA statute.

The Labor Department also advised

Ewald of her right to appeal its findings to an administrative law judge ("ALJ").

Dr. K.C. Das was responsible for supervision and oversight of the program Ewald managed. He was appointed to his position as DWM Director of Administration and Special Programs on April 16, 1987. He set out to establish a "full Superfund" program, consisting of pre-remedial, remedial, and state clean-up components.

His efforts met with "minimum support and cooperation" from Ewald. Ewald's job required her to manage people and work, prepare grant request packages and amendments, and account for her staff's time in a formal time-keeping system. She was also required to make financial projections for the program.

From April 1987 to October 1987,

Ewald failed to respond or untimely fashion to numerous directions and instructions Das gave her. In August 1987, Das gave her a performance rating of 23 out of 50, which he characterizes as "only marginally satisfactory."

His evaluation also recommends, "Training in the area of management development skills is highly desirable." His evaluation report includes a "Performance Planning" sheet, summarizing his views of proficient standards for a program manager such as Ewald.

By mid-October 1987, "It became obvious that Ms. Ewald's lack of support and uncooperative attitude was a distinct detriment to our organization's goals and the program objectives of DWM and that Ms. Ewald was unwilling to improve her attitude or performance," Das states.

After conferring with the state Department of Personnel and Training and with the Attorney General's office, he continued to counsel Ewald but also began recording unsatisfactory performance or unacceptable behavior.

After this, Das gave Ewald the following formal reprimands:

1) a Group I notice on November 5, 1987 for disrupting and leaving a Superfund staff meeting which included new members of her own staff;

2) a Group II notice on April 13, 1988 for her habitual failure to perform required duties or give Das "timely and adequate notice" of her absences during work hours;

3) a Group I notice on July 11, 1988 for continuing to report to work late and leave the office without notice to others; n4

4) a Group I notice on July 22,

1988 for again disrupting and storming out of a meeting before its conclusion; and

5) a final Group I notice on August 29, 1988, citing her continued unsatisfactory performance and resulting discharge.

The July 22 notice prompted Ewald's threat to erase a federal grant application package from her computers. Scheduled to return August 1, 1988, Ewald did not return until August 12, and never gave "adequate or satisfactory reasons" for her absence.

The final notice responded to continued performance problems. Das states that Ewald had, among other things, failed to submit EPA grant amendment applications on time, resulting in the loss of EPA grant money. She had also failed to produce a number of weekly reports, and had not

responded to Das's requests to develop an annual program plan.

Ewald refused to place her acknowledging signature on any of the last three notices.

Das offers the same denials of wrongdoing which Bailey does. He also attaches more detailed Labor Department findings regarding Ewald's complaint to Labor. This report includes one or more levels of hearsay, n5 but is illuminating, and is summarized below.

Ewald was hired as a temporary site investigator in June 1985, and appointed to her director/manager position in September 1986. Her former supervisor, Bob Wickline, witnessed her disrupting a meeting once before Das replaced him.

A Superfund grant for the period ended February 1987 was "overspent" by $60,000. Numerous memoranda from June

1987 until Ewald's termination explicitly describe Das's expectations and Ewald's apparent failure to respond to them. Ewald made apparently three allegations regarding misappropriation of EPA grant funds, all of which were investigated and corrected or found to be insubstantial.

The Labor report concluded that Ewald did contact EPA about her grant misappropriation concerns by November 9, 1987, and that Das knew about this. It found her discipline was not a result of these complaints, however, but because of her inability to cooperate with Das' management style, which was much more aggressive and involved than Wickline's. It emphasized that numerous instances of Das' dissatisfaction with Ewald, including the first discipline notice, preceded Das' apparent knowledge of Ewald's mismanagement complaints. See

Attachment X to Das Aff. at 2-4 (describing language of over 30 DWM memoranda authored by Ewald or Das).

Finally, defendant Winston Evans states by affidavit that he never had any authority over Ewald. He states he did not participate in any discipline of her, except perhaps for typing the discipline notices, in his capacity as executive secretary to the DWM director since July 1986.

Ewald's response is a legal brief, her own affidavit, and copies of memoranda she wrote while at DWM. By affidavit, she states that Das repeatedly refused to address staff complaints and problems, and undermined the technical work which Ewald supervised.

Das frequently pulled staff from scheduled grant work and ordered them to perform alternate tasks, Ewald states.

Das also allegedly hired unqualified persons for jobs. After Ewald once objected to this practice, she was excluded from further hiring selections, even for positions under her supervision.

Ewald states that she first contacted the EPA by phone on October 19, 1987, about her concerns over misappropriation of EPA grant funds. She states that she met on November 4, 1987 with EPA officials in Philadelphia. She states that Das had a "representative" at that meeting, who reported her complaints to Das. The next day, she received her first written notice of poor performance. Her attempts to grieve the notice were unsuccessful.

She describes her July 22 notice as alleging disruptive behavior "at a meeting, which in fact, never took place." She says her extended absence

after this notice included sick leave, when she called her absences into the office each morning.

Most of the remainder of her affidavit adds little more detail. All allegations of defamation and conspiracy remain just that -- allegations. See Ewald Aff. at paras. 54-63. She states that she did not appeal her termination through the state grievance procedure because it did not provide for discovery, statements under oath, or binding effect on the appellee agency. She adds that she did not understand the procedure to be her exclusive forum for redressing employment grievances, and commenced instead her Labor Department complaint.

Her response discusses the work involving the VEFSF site at length. Based on her attachments, it appears that Das asked persons she supervised to

give him a report on testing at the site, also known as "Cheatham Annex," which they did on August 21, 1987. This offers little new information beyond that contained in a May 21, 1987 report Ewald submitted to Das. According to a July 22, 1988 memorandum Ewald wrote to Bailey, Das asked the staff to produce the August report because he had never received the information from Ewald.

Ewald also submits a copy of an August 24, 1987 memorandum to Das, pointing out this duplication of information and further expressing concern that Das had appointed an inexperienced person to write the grant proposal for further testing and clean-up of the facility.

In a July 22, 1988 memorandum to Bailey, however, Ewald concedes having "no first hand knowledge of actions related to Cheatham Annex since . . .

May 21, 1987."

III.

As discussed below, the Court finds summary judgment for defendants appropriate on the constitutional claims. It would therefore dismiss those claims, and then exercise its discretion to dismiss the pendent state law claims. See United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

Nonetheless, there are alternative reasons advanced for dismissing one or more parties and claims. These arguments deserve brief consideration.

First, there is no proof that defendant Winston had anything to do with any alleged misconduct, other than the role he concedes he may have had: typing up memoranda or disciplinary notices. He must be dismissed.

Second, conspiracy is not even adequately pled. There certainly is not

the sort of persuasive and specific information of conspiracy which would take the conspiracy allegations beyond summary judgment. See, e.g., Lombard's, Inc. v. Prince Mfg., Inc., 753 F.2d 974 (11th Cir. 1985), cert. denied, 474 U.S. 1082 (1985); Davis v. Sprouse, 405 F. Supp. 45, 46 (E.D. Va. 1975); Spidle v. Commonwealth of Pa., 660 F. Supp. 941, 945-46 (M.D. Pa. 1987), aff'd, 888 F.2d 1385 (3d Cir. 1989); see also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 287-88 (1968) (summary judgment proper where plaintiff fails to offer probative evidence of conspiracy); Coverdell v. Department of Social & Health Servs., 834 F.2d 758, 769 (9th Cir. 1987) ("Even in a civil rights action, plaintiff may not survive a motion for summary judgment without offering some evidence in support of her claim.") (citations

omitted). Furthermore, the intracorporate conspiracy doctrine applies here. E.g., Saigh v. Matsushita Elec. Corp. of America, 676 F. Supp. 1332, 1341-43 (E.D. Va. 1987).

Third, the parties' dispute about the applicability of Bivens to this case is unwarranted. Bivens stands for the proposition that parties may bring claims for damages directly under the constitution for injuries caused by federal actors, absent certain "special factors counselling hesitation." See Bivens, 403 U.S. at 389, 396.

Defendants argue for dismissal based on the alleged presence of "special factors," but concentrate in any case on the merits of the constitutional claims. Construing this complaint as one under 42 U.S.C. §§ 1983, 1985 and 1988 would not prejudice their argument, would not prejudice

plaintiff, and would comport with the general policy of reading pro se n6 complaints liberally. This action certainly falls within the parameters of the civil rights laws. n7

Fourth, even if the Court were not to dismiss both federal claims, the pendent emotional distress claim is barred by the Worker's Compensation Act. Haigh, 676 F. Supp. at 1354; cf. Va. Code Ann. @ 65.1-3 (Commonwealth an employer for purposes of act).

Fifth, Virginia has consistently applied the one-year "catchall" statute of limitations of Virginia Code § 8.01-248 to defamation actions. Morrissey v. William Morrow & Co., 739 F.2d 962, 967 (4th Cir. 1984), cert. denied, 469 U.S. 1216 (1985). There is no evidence that the defendants republished any allegedly defamatory statements after Ewald was fired in

August 1988, except perhaps in the context of this litigation. See Watt v. McKelvie, 219 Va. 645, 248 S.E.2d 826 (1978). Any defamation claims are thus barred by the statute of limitations. n8

Finally, the DWM is clearly immune under the eleventh amendment to the constitution from liability for money damages, as are its agents sued in their official capacity. E.g., Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989). But Ewald's complaint is against Bailey and Das in their personal capacity. The eleventh amendment is no bar to 42 U.S.C. § 1983 damages against officials in their individual capacity for violations of federal law. See Scheuer v. Rhodes, 416 U.S. 232, 238 (1974).

In sum, simple analysis makes clear that: 1) DWM must be dismissed from this action as immune from suit; 2) any

claims based on a conspiracy theory should be dismissed; 3) defendant Winston Evans should be dismissed because there is no evidence that he took part in any wrongdoing; 4) no claim for intentional infliction of emotional distress exists, because of the worker's compensation bar; and 5) any defamation claim is barred as untimely.

IV.

The constitutional claims deserve closer analysis.

First amendment claim

Ewald's first amendment claim is grounded on her reported allegations of mismanagement. Nothing in the record indicates she was disciplined or terminated for her "association" with any person, group, or set of ideas.

The first amendment protects the right of public employees to comment as

citizens on matters of public concern. See Connick v. Myers, 461 U.S. 138, 143 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

Whether employee speech addresses public concern is a matter of law, but is determined by the "content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48 & n.7; accord Huang v. Board of Governors of the Univ. of N.C., 902 F.2d 1134, 1140 & n.7 (4th Cir. 1990).

Factors relevant to the inquiry include: the motive and intended meaning of the speaker, see Rankin v. McPherson, 107 S. Ct. 2891, 2895 n.4 (1987); Connick, 461 U.S. at 147-48; public interest in the subject of the speech, which is presumed to be minimal where the speech concerns only internal employment practices, Rode v.

Dellarciprete, 845 F.2d 1195, 1201 (3d Cir. 1988) (citing Connick, 461 U.S. at 148-49); and the general factual background in which the statement arose, including what prompted the statement, see, e.g., Rankin, 107 S. Ct. at 2897-98 & nn.10-12; Rode, 845 F.2d at 1201-02.

The Fourth Circuit succinctly stated the burdens and applicable law in this area in Huang, supra.

First, Ewald bears the burden of proving that she made statements related to a matter of public concern. Huang, 902 F.2d at 1140. Her statements are not a matter of public concern, to the extent they reflect merely personal complaints about her own employment conditions. Id.; see, e.g., Johnson v. Town of Elizabethtown, 800 F.2d 404, 406 (4th Cir. 1986) (long hours, length of lunch breaks, and monitoring of

lunch breaks and vacation days not matters of public concern).

Even if Ewald meets that burden, first amendment protection attaches only if her interest in the speech "outweighs the employer's interest in effective and efficient fulfillment of its responsibilities to the public." Huang, 902 F.2d at 1140 n.7 (quoting Connick, 461 U.S. at 150).

Second, Ewald must show deprivation of some valuable benefit. Id. at 1140 (citations omitted).

Third, the Fourth Circuit imposes a "rigorous" causal relationship test:

> It is not enough that the protected expression played a role or was a motivating factor in the retaliation; claimant must show that "but for" the protected expression the employer would not have taken the alleged retaliatory action.

Id. (citing, inter alia, Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 417 (1979)).

In reviewing a summary judgment adverse to the plaintiff, then, the Huang court stated that summary judgment was improper only if the record reflects that he made a statement on a matter of public concern, that this expression was the "but for" cause of his [allegedly adverse] transfer, and that the transfer . . . deprived him of a valuable benefit. Id.

The court affirmed the summary judgment against Dr. Huang where: 1) the record contained little to support Huang's assertion that he made allegations of misuse of funds; 2) much time passed between his alleged protected speech and his transfer; 3) defendants had a substantial record of Huang's professional performance difficulties and the deterioration in his professional relations with peers, culminating in a physical altercation

with another faculty member. Id. at 1140-41; see also Johnson, 800 F.2d at 406-07 (affirming JNOV on first amendment jury verdict for plaintiff, where defendant town commissioners "testified uniformly that incompatibility, which interfered with smooth town administration, was the reason for the discharge," and overwhelming evidence was that plaintiff was combative and difficult to work with, despite officials' knowledge of plaintiff's complaints about some issues of public concern).

For summary judgment purposes, the Court accepts that Ewald spoke on matters of public concern at some time before her discharge. The Court nevertheless finds no material dispute that such speech was not the "but for" cause of the discharge.

Considering the record as a whole,

it is apparent that Ewald's supervisors had problems with her as early as the fall of 1986. This was long before Ewald even contends that she began complaining about mismanagement of state and federal funds.

There is no dispute that Ewald resisted and resented the actions of her new supervisor, Das, from the moment he got the job. Many of her complaints were about personal employment differences she had with Das' management style. Most notably, Ewald does not deny that she threatened to erase a federal grant package after one of her disciplinary notices. She offers no support for her contention that her extended absence in August 1988 was for sick leave.

Due Process

Defendants contend that the due

process claim is "frivolous" because the state employee grievance procedure has been held to afford constitutional due process. Detweiler v. Virginia Dep't of Rehab. Servs., 705 F.2d 557, 560 (4th Cir. 1983).

But Ewald correctly points out that Detweiler has been limited since Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), as discussed in Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985).

Detweiler remains valid as far as it holds that Virginia's statutes and regulations regarding nonprobationary public employees give those employees a protected property right in employment. Buschi, 775 F.2d at 1255 & n.7; Detweiler, 705 F.2d at 559-60. But it is abrogated in part by Loudermill's holding that such an employee is entitled to "some kind of hearing"

before discharge. Buschi, 775 F.2d at 1255 (quoting Loudermill, 470 U.S. at 542-44).

The Fourth Circuit has emphasized, however, that Loudermill requires nothing more than: 1) an oral or written notice of the charges, 2) a summary of the employer's evidence, and 3) an opportunity to present her side of the story. Id. (quoting Loudermill, 470 U.S. at 546).

The court held in Buschi that all three requirements were met where the defendant offered the discharged employees an opportunity for individual interviews, which they rejected, even though he had also told them their responses would not change his mind. See id. at 1255-56.

The court later upheld against due process challenge a dismissal where defendant offered plaintiff several

previous chances to respond to allegations of misconduct, even though plaintiff never received a written notice of all the charges against him until after his meeting with the defendant. Riccio v. County of Fairfax, Va., 907 F.2d 1459, 1463-65 (4th Cir. 1990); see also Smith v. Wythe-Grayson Reg'l Library Bd., 657 F. Supp. 1216, 1221 (W.D. Va. 1987) (Loudermill satisfied where plaintiff refused to discuss discharge in person but left work in middle of day after leaving written response, and previous complaints had given her substantial notice of charges, and opportunity to respond); Leftwich v. Bevilacqua, 635 F. Supp. 238, 241 (W.D. Va. 1986) (defendant saw plaintiff, advised him of decision based on prior complaints, and plaintiff offered no explanation or evidence on his behalf).

Here, the final termination notice and attachment contained several specific recitations of Ewald's most recent shortcomings. It also referred back to the past notices, and other informal requests for improved performance.

Ewald claims, however, that Das immediately walked away after showing her the written notice. Das' affidavit does not state that he asked Ewald for a response, or waited any particular time for a response.

In short, the first two prongs of Loudermill seem clearly satisfied. The third prong -- opportunity to explain or question charges -- is more problematic.

Based on the record and Fourth Circuit law, however, the Court finds that this prong is also satisfied. Ewald received repeated disciplinary notices

and informal reminders of defendants' expectations for her She refused to give her acknowledging signature to any of the last three formal notices, although she concedes that each one was presented to her.

Ewald also refused to resort to the extensive post-termination procedures established by Virginia law for state employees. See Loudermill, 470 U.S. at 547 & n.12 (existence of post-termination procedures relevant to necessary scope of pre-termination procedures).

Even the briefest of face-to-face encounters satisfies due process in such circumstances. Such an encounter undoubtedly occurred here. Requiring anything more would "intrude to an unwarranted extent on the [Commonwealth's] interest in quickly removing an unsatisfactory employee."

Id. at 546.

FINAL ORDER - April 22, 1991, Filed

For the reasons stated in the accompanying memorandum, defendants' motion for summary judgment is GRANTED, plaintiff's motion for relief is DENIED, and judgment is ENTERED for defendants.

Plaintiff is reminded that this is a final order subject to appeal, upon notice filed within 30 days of the date of this order as prescribed by the Federal Rules of Appellate Procedure.

And it is SO ORDERED.

FN1 As discussed infra, the parties dispute the applicability of Bivens. The Court finds that irrelevant, when 42 U.S.C. §§ 1983 and 1985(3) clearly

apply. Defendants acknowledge the complaint could be construed to invoke these statutes, and the arguments on the merits of the claims remain the same.

FN2 This discussion excludes redundant or conclusory allegations regarding harm and state law claims.

FN3 Several federal environmental statutes have "employee protection" clauses which ban discrimination against or firing of employees for "whistleblowing" or filing of suit regarding administration or enforcement of the statutes. They authorize the aggrieved employee to bring an administrative claim with the Labor Department, which may order rehiring and reinstatement plus back pay, if the claim is upheld. The department's orders are subject to judicial review. See, e.g., 42 U.S.C. § 9610; 42 U.S.C. §

6971.

FN4 A later notice for similar behavior was withdrawn, based on Ewald's offer of evidence that she was not late on the date in question.

FN5 But see Fed.R.Evid. 803(8)(C) (reports of public agencies offering factual findings from investigation made pursuant to authority granted by law not hearsay). The Court finds that the record in this case supports its ruling, even if this report is entirely ignored.

FN6 Plaintiff admits to having a law degree, however, and has demonstrated competence in oral advocacy and legal writing and analysis. These factors are among those that persuade the Court to deny the plaintiff's "Emergency Motion for Relief from Pretrial Order," filed the day before hearing on the summary judgment motion, and 15 days before the scheduled

trial date.

The motion and brief demonstrate Ewald's awareness of the very rules and time limits she complains of. Plaintiff has repeatedly attempted to delay this case, and was reminded in Court of her obligations to prosecute her case, and to respond to the motions against her. Her only response has been to seek further delay. She has had nearly eight months since filing her complaint to offer any other person's testimony or affidavit to corroborate her material allegations. She has not done so.

FN7 Defendants' argument as to Bivens is not persuasive, in any case. They state that the federal statutes described supra note 3 are comparable to the federal administrative schemes in Schweiker v. Chilicky, 108 S. Ct. 2460 (1988) and Bush v. Lucas, 462 U.S. 367 (1983). They are not.

Schweiker held that the intricate administrative scheme for appeal of Social Security Disability Act decisions evinced the type of "special factor" counseling against a Bivens remedy for alleged due process violations arising from the wrongful withholding of benefits. Schweiker, 108 S. Ct. at 2468-71. In Bush, the Court refused to permit a Bivens action for deprivation of first amendment rights by a federal employer, in light of the complex and comprehensive nature of the federal civil service system, which had developed over many years. See Bush, 462 U.S. at 388-90.

The "whistleblower protection" laws here are fairly new and simple, and do not permit damages besides back pay. The Court knows of no other court which has accepted the argument defendants make here.

FN8 Defendants did plead limitations as an affirmative defense in their answer.